NO. 92-1720

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE J. BRADY, BARBARA A. BRADY,
DEBORAH R. LABOVITZ, AND JUDAH I. LABOVITZ,

PETITIONERS,

V.

THE STATE OF NEW YORK, MARIO CUOMO,
AND JAMES WETZLER,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

ALBERT G. LAUBER, JR.
CAPLIN & DRYSDALE,
CHARTERED
ONE THOMAS CIRCLE, N.W.
WASHINGTON, D.C. 20005

SCOTT H. MUSTIN
LABRUM & DOAK
1818 MARKET STREET
SUITE 2900
PHILADELPHIA, PA 19103

JOSEPH H. EINSTEIN
GOODKIND, LABATON, RUDOFF &
SUCHAROW
122 EAST 42ND STREET
NEW YORK, NY 10168

DAVID H. WEINSTEIN*
ROBERT S. KITCHENOFF
LINDSEY B. SLAUGHTER
KOHN, NAST & GRAF, P.C.
1101 MARKET STREET
SUITE 2400
PHILADELPHIA, PA 19107
(215) 238-1700

ATTORNEYS FOR PETITIONERS

*COUNSEL OF RECORD

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Aronov v. Secretary of Revenue, 371 S.E.2d 468 (N.C. 1988) 6

Eisenstadt v. Baird, 405 U.S. 438 (1972) 2

Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937) 6

Maxwell v. Bugbee, 250 U.S. 525 (1919) 5, 6

McClure v. United States, 228 F.2d 322 (4th Cir. 1955) . . 3

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992) 2

Stevens v. State Tax Assessor, 571 A.2d 1195 (Me.), *cert. denied*, 111 S.Ct. 65 (1990) 1, 6

Trinova Corp. v. Michigan, 111 S.Ct. 818 (1991) 7

United States v. Kansas, 810 F.2d 935 (10th Cir. 1987) . . 6

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 6

In re Wetteroff, 453 F.2d 544 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972) 3

Wheeler v. State, 249 A.2d 887 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969) 6

Wheeler v. State, 253 A.2d 136 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969) 6

STATUTES

NEW YORK TAX LAW

§ 601(d) 5

§ 601(e) 5

§ 651(b)(2) 4, 5

§ 651(b)(4) 3, 4

ME. REV. STAT. ANN. tit. 36 § 5221(2) 1

26 U.S.C. § 6103(d)(1) 1

OTHER AUTHORITIES

W. Hellerstein, *Some Reflections on the State of Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. 1309 (1974) . . . 7

REPLY BRIEF FOR PETITIONERS

1. In its brief, New York has offered no substantive or precedential justification for the compelled inclusion of a nonresident spouse's income on a nonresident's tax return. The requirement violates due process.

Petitioners have stated (Pet. at 13) that there is no known prior court decision supporting the constitutionality of including a spouse's income in the formula for taxing a nonresident's income. The State disputes this assertion, pointing (Br. at 15-16) to *Stevens v. State Tax Assessor*, 571 A.2d 1195 (Me.), *cert. denied*, 111 S.Ct. 65 (1990). *Stevens*, however, lends no support to the State.

Although the nonresident taxpayers in *Stevens* were married, their case did not concern a due process challenge to the involuntary inclusion of the spouse's income in the calculation of the taxpayer's income tax. *See* Pet. at 19 n.13. The decision is thus silent about it. The Maine statute at issue there, unlike New York's here, offered the nonresident taxpayer the choice of filing either separately or jointly. ME. REV. STAT. ANN. tit. 36 § 5221(2). Having voluntarily opted to file jointly, the taxpayer couple in *Stevens* could hardly claim a due process violation on the theory that joint income was *involuntarily* used as the basis of taxation. That decision, then, offers no support for the New York tax scheme at issue here. And New York points to no other precedent to authorize what the State has done.

The State's brief—like the opinion below—fails to offer any principled basis upon which the nonresident's tax may be determined with reference to income derived by the taxpayer's nonresident spouse, not the taxpayer.[1] The amici curiae, Pennsylvania

---

1 The State's citation (Br. at 17 n.7) to the Internal Revenue Code, 26 U.S.C. § 6103(d)(1) is a "red herring." The statute is irrelevant, because although it may allow New York access to federal income tax return information under certain circumstances, the statute does not authorize the State to use that information in any

(continued...)

and New Hampshire, have discussed the manifold defects of New York's law in this respect, and petitioners specifically adopt that discussion.

In another context, this Court recently explained the distinctiveness and separateness, under our Constitution, of each spouse in a marriage:

> "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. . . ."

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791, 2830 (1992), quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). "The Constitution," the Court continued in *Planned Parenthood*,

> protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

112 S.Ct. at 2830. Of course, here the State's enactment is not even intended to benefit the spouse; rather, New York seeks to extract unwarranted additional tax because of the spouse's activities elsewhere.

New York argues that it may presume that a married couple, by exercising their federal law option to file jointly, thereby intend an election to be treated jointly by any state from which either spouse derives income. New York's argument is logically

---

1(...continued)
particular fashion. At issue here is the constitutionality of New York's *use* of joint income data.

incorrect. The filing of a joint federal return raises no inferences, much less a presumption, about how the nonresidents want to be treated for the very different state tax purposes, which may involve different monetary considerations. Indeed, as petitioners have explained (Pet. at 22), several states, including Maine, afford married couples the right to file separate state returns even if they file a joint federal return. Moreover, New York law does *not* embody such a presumption, since the State offers this "separate return" option to any resident who is married to a nonresident. Tax Law § 651(b)(4). This clearly shows that the filing of a joint federal return does not constitute an election to be considered with one's spouse as a single unit for *all* tax purposes.[2]

The State argues (Br. at 17 n.7) that compulsory inclusion on the taxpayer's return of the nonresident spouse's income "is not an assertion of 'jurisdiction' over the latter." That is simply wrong. By including spousal income in the return, New York increases the tax solely because of the spouse's ability to pay. The State is thus saying one of two things: (1) the spouse's income belongs to and is at the disposal of the taxpayer, or (2) the spouse's ability to pay, considered in isolation, justifies a higher tax. As the amici have explained, the former argument is foreclosed by the law of Pennsylvania and other states. The latter argument is a naked assertion of jurisdiction over the nonresident spouse which, in accordance with the Appellate Division's holding, New York may not exercise.

2. The State questions whether petitioners have properly characterized one of their privileges and immunities challenges and

---

2 New York's unstated but implied presumption also runs counter to the purpose of the joint filing privilege under federal law, to equalize the tax burdens of citizens of common law states and community property states. *See In re Wetteroff*, 453 F.2d 544, 547 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972); *McClure v. United States*, 228 F.2d 322, 325 (4th Cir. 1955). No such rationale could apply intrastate to support New York's argument here.

whether they have preserved the issue. Petitioners described the specific privileges and immunities violation (Pet. at 21) as "permit-[ting] a resident who is married to a nonresident the option of filing a separate return—based solely upon the resident's income—while denying that option to a nonresident who is married to a nonresident." New York does not deny that such discrimination between its residents and nonresidents would violate the privileges and immunities clause. Instead, the State asserts that the petitioners' description of the Tax Law "is untrue" and that the point "was not raised by petitioners in the Court of Appeals." Br. at 19 n.8.

Petitioners' statement *is* true. The Appellate Division in this case cited Tax Law § 651(b)(4) as providing that, "if one of the spouses is a resident and the other is a nonresident, they may elect to file either separate or joint State income tax returns, irrespective of whether they filed a joint Federal return." App. 18a. Clearly, then, the State errs in labelling petitioners' statement "untrue."[3]

Similarly, petitioners have properly preserved this aspect of their privileges and immunities challenge. As they had in their trial court pleadings and motion for summary judgment, petitioners explicitly raised this issue in their brief to the Appellate Division.[4] Following that court's invalidation of Tax Law § 651(b)(2) as

---

3 Surely, the State is not quibbling with the assertion that a separate return in the circumstances would be "based solely upon the resident's income." Tax Law § 651(b)(4) expressly directs the husband and wife to use "separate New York income tax returns on separate forms," and in that event, "their tax liabilities shall be separate." Obviously, the husband reports his income separately from the wife's reporting of hers.

4 The brief (at 1) formulated the issue as whether § 651(b)(2) of the Tax Law violates the privileges and immunities clause because it "denies to such nonresident taxpayers an election afforded similarly situated resident taxpayers to file a separate, individual return."

applied to nonresidents like petitioners, the State's Department of Revenue issued a bulletin to all nonresident taxpayers affording them a "separate return" option, both prospectively and retrospectively, for any years in which their spouses were nonresidents with no New York income. *See* Pet. at 21 n.15. Thus, at the time petitioners took their appeal to the Court of Appeals, there no longer was this portion of the discrimination originally challenged in the trial court and the Appellate Division.

That discrimination only re-emerged as an issue after the Court of Appeals held that joint income must be reported even though on a separate return. In effect, this overruled the Appellate Division's holding in all but one narrow respect: who must sign the tax return. This result was totally unexpected, since the State had not cross appealed from the Appellate Division's judgment invalidating § 651(b)(2) and holding §§ 601(d) and (e) otherwise "marriage neutral." App. 21a. Under these circumstances, this important issue is properly before the Court on the present Petition.

3. In the Petition (at 9) petitioners explained the essential difference, for due process purposes, in the obligations and concomitant tax powers of a domiciliary state and those of other states, precluding the latter to look to the entire income of a nonresident in formulating an income tax. New York does not dispute this fundamental principle. Instead of addressing it and proffering a reasoned explanation why the State's tax scheme comports with due process, the State merely seeks refuge in an illusory "long line" of cases that uncritically relied upon the formalistic myth underlying *Maxwell v. Bugbee*, 250 U.S. 525 (1919). As discussed above, however, none of the cases New York cites supports inclusion of spousal income on the nonresident's tax return.

Contrary to New York's Brief, moreover, there is no "long line" of previous decisions applying the rationale of *Maxwell* to state income taxes like those here. What few decisions there are

cannot withstand critical scrutiny. There are, in fact, only two cases that have directly applied *Maxwell* and *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937), to uphold, against a due process challenge, state income taxes on nonresidents. *See Wheeler v. State*, 249 A.2d 887 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969),[5] and *Stevens*, *supra*.[6] As explained in the Petition (at 19 n.13), neither of those decisions, both from courts of the states imposing the taxes being challenged, provides an adequate reasoned basis for the decision below.

4. The State (Br. at 14) errs in arguing that economic reality supports its tax scheme. The Court has focused upon

---

5 *Wheeler v. State*, 253 A.2d 136 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969), was a companion case involving a different tax year. The dismissal by this Court of the *Wheeler* appeals for want of a substantial federal question adds nothing to the value of *Wheeler* as precedent, despite the State's argument. *See* Br. at 13. This Court's doctrinal developments upon which the Petition is based and upon which the dissent below relied are all subsequent to that dismissal. As demonstrated by *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), on which the State relies (Br. at 13), the Court is not barred from granting review of an issue in a subsequent case, like this one, merely because it may have dismissed the appeal in an earlier case, such as *Wheeler*.

6 The State implicitly acknowledges, by relegating them to a footnote (Br. at 15, n.6), that the only two other decisions in the putative "long line" are not directly on point. *See Aronov v. Secretary of Revenue*, 371 S.E.2d 468 (N.C. 1988) (out-of-state deductions), and *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987) (statutory construction), discussed in the Petition (at 19 n.13). The dissent in *Aronov* explained that the "attempted taxation must fail 'where the State exceeds its authority in imposing a tax upon a subject-matter within its jurisdiction *in such a way as to really amount to taxing that which is beyond its authority.*'" 371 S.E.2d at 475-76, quoting with emphasis added, *Maxwell*, 250 U.S. at 539-540.

economic reality,[7] because labels are an inadequate substitute for understanding the true consequences of a taxing scheme. As the dissent recognized below, the "significance for present purposes" of this Court's prior cases cited in the Petition (at 16-17) "is not their specific holdings but the methodology employed by the Court in analyzing the statutes: *i.e.*, looking to the practical effect and economic realities of the tax in issue." App. 12a n.1.

New York, like the court below, nevertheless takes cover behind labels, saying that, while the State's income tax is *measured by* total income, including out-of-state income, the tax is only *imposed on* the in-state portion of the income. This is a resort to legal fiction, not an analysis of economic reality. As the Court has recently observed, "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." *Trinova Corp. v. Michigan*, 111 S.Ct. 818, 829 (1991). The reality is that New York's tax on nonresidents' income is increased *solely because of* non-New York income. That is tantamount to an impermissible tax on the non-New York income.

In the Petition, petitioners have explained the various reasons why this case, dealing with the tax powers of states over hundreds of thousands, if not millions, of interstate commuters, is an important one for the Court to review. New York has not disputed any of those reasons. As the dissent below correctly observed, "Whether the [Supreme] Court will again resort to the *Maxwell*-type of labelling in order to uphold a taxing scheme—where out-of-

---

7 While the State quotes Prof. Hellerstein's general discussion of the rationale for progressive tax structures (Br. at 14), the State carefully avoids his conclusion that the justification for such structures "is rooted in fundamentally jurisdictionless concepts." W. Hellerstein, *Some Reflections on the State of Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. 1309, 1324 (1974). It is nevertheless clear the author does not support a *Maxwell*-based logic applied to the circumstances here. *See* Pet. at 17, n.11; 21 n.14.

state income of the taxpayer and the taxpayer's spouse is used to increase the tax on the taxpayer's in-state income—only the Supreme Court can tell us." App. 16a. This case is an excellent opportunity for the Court to embrace economic reality in individual income taxation as it has already done in corporate taxation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: May 28, 1993

David H. Weinstein*
Robert S. Kitchenoff
Lindsey B. Slaughter
Kohn, Nast & Graf, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Albert G. Lauber, Jr.
Caplin & Drysdale
Chartered
One Thomas Circle, N.W.
Washington, D.C.

Joseph H. Einstein
Goodkind, Labaton,
Rudoff & Sucharow
122 East 42nd Street
New York, NY 10168

Scott H. Mustin
LaBrum & Doak
1818 Market Street, Suite 2900
Philadelphia, PA 19103

Attorneys for Petitioners

*Counsel of Record